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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVEN RAY WIDNEY, Defendant and Appellant.	E048450 (Super.Ct.No. RIF139841) OPINION

APPEAL from the Superior Court of Riverside County. Gloria C. Trask, Judge. Affirmed with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Steven Ray Widney guilty of grand theft. (Pen. Code, § 487, subd. (a).)[1] The lesser included offense of attempted grand theft (§§ 664, 487, subd. (a)) was thereafter dismissed in the interest of justice. Defendant was sentenced to the low term of 16 months in state prison. On appeal, defendant contends: (1) there was insufficient evidence to sustain his conviction for grand theft; (2) the trial court erred in allowing the owner of the stolen item to testify as to its value; and (3) the trial court erred in failing to award two days of conduct credit at the time of sentencing. Because the record is unclear whether defendant is entitled to two days of conduct credit based on his performance, we will remand the matter to the trial court. We, however, reject defendant's remaining contentions.

I

FACTUAL BACKGROUND

Fred Zimmer was a plant manager for Cla-Val Company (Cla-Val) located in Riverside County. Cla-Val owned 20 acres of property and rented out about one and one-half to two acres to Craftech Metal Forming (Craftech). Cla-Val property was protected by a five-foot chain-link fence with three rows of barbed wire on top and an infrared security system.

On October 27, 2007, around 1:00 a.m., Zimmer received a telephone call from the security company indicating zone 5, located on the east side of the Cla-Val property,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

had been breached. Zimmer requested the security company call the police to the location. He went to the location to meet the police.

As Riverside County Sheriff's Department Corporal Williams responded to the location, he saw a black Chevrolet Silverado, towing a flatbed trailer containing a bobcat, leaving the area. Corporal Williams did not "think anything of it at the time," and he left the area to assist another officer, who had "requested emergency backup."

Corporal Williams later returned to the Cla-Val property and met with Zimmer. Both of them then drove in their respective cars to the zone 5 area. When they arrived at the location, they noted the fence had been cut. Zimmer heard metal screeching and also saw a man in a hooded sweatshirt and the bucket of a bobcat, which was backing up. When the man in the hooded sweatshirt saw Zimmer, he ducked under the fence and fled. Zimmer yelled, "'there they are,'" to Corporal Williams.

Zimmer also noticed a chain wrapped around one of the metal dies belonging to Craftech, 12 feet outside the fence. The chain was connected to the bobcat. The metal screeching Zimmer heard earlier was the metal die being pulled out "from underneath the fence" by the bobcat. The metal die was located outside the chain-link fence, specifically, outside Craftech's property, on an easement belonging to a utility company.

Richard Shaw is the owner of Craftech. Craftech makes airplane parts for such companies as Boeing Aircraft (Boeing) and Northrop from sheet metal by using dies to stamp out the parts. Some of the dies are owned by Boeing.

After being burglarized a couple of times in 2007, Shaw had 16 security cameras installed around Craftech. One of the security tapes with the date and time stamp of

October 27, 2007, at 1:52 a.m., showed a pickup truck towing a trailer with a bobcat on it. Another security tape showed the bobcat near the fence where the thieves initially tried to use the bobcat to reach over the fence to pick up the metal die, but the die fell to the ground as it was too heavy. The thieves then used a chain and the bobcat to drag the die through the fence. The security tape depicted two people inside the fence and one on the bobcat. The security tapes were played for the jury.

Shaw identified the stolen metal die, which was located outside Craftech's property, as one made by Craftech but owned by a customer. If it is customer-owned, a legal agreement is drafted and signed making Craftech the agent and possessor of the metal die. The metal die weighed approximately 1,500 pounds, was 18 inches by 18 inches, and cost between $4,000 to $4,600 to build. Shaw knew his business and the value of most of his tools. The metal die was made of kirksite, which is about 94 to 96 percent zinc alloy and was built within the last 10 years. He noted that the value of zinc fluctuated and that in 2007 it was "close to $2 a pound."

Corporal Williams pursued the black Chevrolet Silverado pickup truck and eventually pulled it over. Codefendant Thomas Baumbach, dressed in a hooded sweatshirt, was driving the truck. Corporal Williams conducted a registration check on the vehicle and the trailer and discovered that they both were registered to defendant. Defendant also owned the bobcat. Corporal Williams interviewed Baumbach at the scene. Baumbach informed the corporal that he was at Craftech to take scrap metal thinking he would get about $150 for it. He explained that after he went through the hole in the fence, he wrapped a chain, which was attached to the bobcat driven by defendant,

around the metal die. He then pulled the metal die into the area where the truck and trailer were parked. Later, at the police station, Baumbach stated another vehicle was involved; that defendant had been with the bobcat; and that defendant was probably hiding in the bushes.

At trial, Baumbach, who had pleaded guilty for his involvement in this case and admitted to serving two prison terms, denied defendant was involved in the incident. He claimed that he went to Craftech with the intention of stealing the dies or molds with a person named "Chris." He acknowledged using defendant's truck, trailer, and bobcat; he claimed defendant was not with him on the night of the incident. Baumbach did not recall telling Corporal Williams that defendant was involved in the incident. On cross-examination, he asserted that he did not make a statement to officers "pointing the finger at [defendant]." Baumbach explained that Chris had tied up the chain to the metal die and he had dragged it 10 to 12 feet outside the fence using the bobcat.

Sergeant Brown of the Riverside County Sheriff's Department responded to the scene at approximately 2:00 a.m. and arranged to have the truck, trailer, and bobcat impounded. Around 4:00 p.m. that same day, Sergeant Brown received a telephone call from defendant inquiring as to when he could pick up his truck, trailer, and bobcat. Sergeant Brown and another deputy thereafter went to defendant's residence. Defendant told the officers that he was having an affair with a friend named Janet Parke, that he was with her during the time of the incident, and that he wanted to pick up his truck, trailer, and bobcat. Defendant explained that because he had told his wife he was going to Arizona on a construction job, he had given his truck, trailer, and bobcat to Baumbach in

case his wife drove by Parke's home. Defendant was subsequently arrested. While another deputy transported defendant to the police station, Sergeant Brown went to Parke's home to speak with her.

Initially, Parke informed Sergeant Brown the same story as defendant did. Sergeant Brown thereafter returned to the police station and again spoke with defendant. Defendant repeated the same story. However, when Sergeant Brown pointed out inconsistencies between his statements and others, including what had been captured by video security cameras, defendant admitted being at Craftech on the night of the incident with Baumbach and another individual. He also admitted to driving the bobcat and intending to steal two or three dies (or as many as they could fit on the trailer), and how they were expecting to get $2,000 for them. Defendant explained that when they first arrived at the location, they cut a hole in the fence, but fled when they thought they had set off the security alarm. They returned after the responding officer left. When the officers returned the second time, defendant asserted that he fled and hid in a large metal storage container for two hours. Thereafter, he walked 15 miles and then had a friend drive him to Parke's house, where he asked her to lie for him.

Sergeant Brown returned to Parke's house a second time. He informed her that Baumbach and defendant had admitted the theft, that her story was in contradiction to their two stories, and that she should tell the truth. He also told her that if she was not going to tell the truth, she would be arrested. Parke eventually recanted her initial statements and explained that defendant, Baumbach, and Chris were at her home that evening, but all three left with the truck, trailer, and bobcat. Defendant returned around

2:00 a.m., told her he was in trouble, and asked her to lie for him. Parke admitted her affair with defendant.

At trial, Parke denied having an affair with defendant. She claimed that when Sergeant Brown returned a second time, he called her a liar, and when she said defendant was at her house during the incident, he handcuffed her and told her she was going to jail. Sergeant Brown then went inside, searched her house without a warrant, and pepper-sprayed her dogs. He thereafter drove her to defendant's house and threatened to have defendant's wife come out and beat her up if their stories did not match. He drove her back to her house, took off her handcuffs, and told her to lose weight. He also said, "don't tell me [defendant] wasn't there at 1:00."

In response to Parke's claims, Sergeant Brown admitted to pepper-spraying her dogs, searching her house, and placing her in handcuffs. However, he said he did so because there was a Hispanic male that had run out of the back of the house and over a fence, and he did not know what was going on. He, therefore, searched the residence for safety and, in the process, had pepper-sprayed the dogs. He denied driving Parke to defendant's home to confront defendant's wife.

II

DISCUSSION

A. *Insufficiency of the Evidence*

Defendant contends there was insufficient evidence to support his conviction for grand theft because the possession and asportation elements were lacking, requiring his conviction to be reduced to attempted theft. We disagree.

When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

There is no merit to the contention the evidence is insufficient to support defendant's conviction of grand theft. The contention amounts to no more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the jury. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) All that is required to demonstrate the asportation element of theft is that the thief took possession of the property, detaching it from its location and moving it "slightly with the intent to deprive the owner of it permanently." (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654.) Any movement of the property with the requisite intent is sufficient to constitute asportation. (*Ibid*.)

In *People v. Davis* (1998) 19 Cal.4th 301, a department store security agent observed the defendant remove a shirt from its hanger and take it to the cashier. The defendant told the cashier he had bought the shirt for his father, it did not fit, and he

wanted to return it. (*Id*. at p. 303.) The agent called the cashier, confirmed the defendant had asked to "'return'" the shirt, and instructed the cashier to proceed in issuing a credit voucher. The cashier prepared the voucher and asked the defendant to sign it. He signed it with a false name. The defendant was then detained by the security agent as he walked away from the counter with the voucher. (*Ibid*.) The trial court denied the defendant's motion for judgment of acquittal of the crime of petty theft with a prior, in which he argued "on the facts shown he could be convicted of no more than an attempt to commit petty theft." (*Id*. at p. 304.) A jury convicted the defendant of petty theft, and the appellate court affirmed the conviction. (*Ibid*.)

The California Supreme Court affirmed the judgment of the Court of Appeal. (*People v. Davis*, *supra*, 19 Cal.4th at p. 303.) The Supreme Court explained, "The act of taking personal property from the possession of another is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property. [Citation.] . . . [I]f the taking has begun, the *slightest movement of the property constitutes a carrying away or asportation*." (*Id*. at p. 305, fns. omitted, italics added.) Notwithstanding the fact the defendant had been under surveillance and was apprehended as he walked away from the counter, the California Supreme Court stated: "Applying these rules to the facts of the case at bar, we have no doubt that defendant (1) took possession (2) of personal property—the shirt—(3) owned by [the department store] and (4) moved it sufficiently to satisfy the asportation requirement." (*Ibid*.)

In *People v. Shannon*, *supra*, 66 Cal.App.4th 649, a loss prevention agent observed the defendant walking around a department store and carrying a bag. The agent

followed the defendant to the dress department, where he saw the defendant hold up two skirts and a sweater, undo the clips holding these items to their hangers, and allow the items to fall to the ground out of the agent's sight. (*Id*. at p. 652.) The defendant bent down, picked up the bag, and walked to the cashier. The agent observed that the bag appeared "noticeably fuller." (*Ibid*.) When the defendant reached the cashier, he placed the items in his bag on the counter. (*Id*. at p. 653.) The agent telephoned the cashier and confirmed that the defendant had asked for a refund for the items. The cashier was given authority to give the defendant a $102.83 cash refund. The defendant left the store and was then placed under arrest by the agent. (*Ibid*.)

The defendant was convicted of petty theft with a prior. (*People v. Shannon*, *supra*, 66 Cal.App.4th at p. 651.) The defendant argued that he committed attempted theft because he did not actually remove the clothes from the store. (*Id*. at p. 653.) The appellate court rejected the defendant's argument, stating, "'''[t]he completed crime of larceny—as distinguished from an attempt—requires asportation or carrying away, in addition to the taking. [Citations.]" [Citation.] "The element of asportation is not satisfied unless it is shown that 'the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment.'" [Citation.]' [Citation.] However, one need not remove property from the store to be convicted of theft of the property from the store. [Citations.] One need only take possession of the property, detaching it from the store shelves or other location, and move it slightly with the intent to deprive the owner of it permanently." (*Id.* at p. 654.) The appellate court added, "even if [the defendant] intended to abandon the clothes if his

scheme failed, the theft was complete when he dropped the clothes into his bag intending to defraud the store of their monetary value." (*Id*. at pp. 656-657.)

In this case, asportation occurred when defendant and his cohorts tied a chain around the metal die and then pulled or dragged the metal die approximately 12 feet outside Craftech's property. Defendant and his cohorts had already reduced the metal die to their possession when they were discovered by Zimmer. As in *People v. Davis*, *supra*, 19 Cal.4th 301 and *People v. Shannon*, *supra*, 66 Cal.App.4th 649, defendant's theft of the metal die was complete, notwithstanding evidence showing he had been discovered before he and his cohorts could make a clean get away with the metal die. The jury was instructed below on the crime of attempted grand theft, but rejected that argument. The evidence here is ample to support defendant's conviction of grand theft, as opposed to attempted grand theft.

B. *Testimony of Shaw as to Value of Metal Die*

In a related claim, defendant asserts the evidence was insufficient to support his conviction for grand theft, in that there was no competent evidence to establish the value of the metal die. Defendant poses several reasons why Shaw's testimony was insufficient to support the finding that the metal die was worth more than $400. First, he maintains that Shaw was never established as the owner of the die. Second, he argues that the value indicated by Shaw constituted inadmissible hearsay. (Evid. Code, § 1200.) Third, he asserts that there was no foundation for his opinion that the value of the die was $4,500, or the price for zinc/kirksite was $2 a pound at the time the theft was committed.

As defendant points out, theft is divided into two categories: grand theft and petty theft. (§ 486.) Grand theft is taking of personal property of a "reasonable and fair market value" exceeding $400. (§§ 484, 487, subd. (a).) The value of an item of stolen personal property, whether new or used, is measured at the time and place of its theft. (*People v. Pena* (1977) 68 Cal.App.3d 100, 102-104.) "Put another way, 'fair market value' means the highest price obtainable in the market place rather than the lowest price or the average price." (*Id.* at p. 104.)

In some instances, fair market value is synonymous to replacement value. (*People v. Renfro* (1967) 250 Cal.App.2d 921, 924.) For example, in *Renfro*, the appellate court held that in order to determine the degree of theft, one ordinarily assesses the fair market value of the stolen property. However, "under circumstances where, for example, the [stolen] property has a unique or restricted use and an extremely limited market, the actual or replacement cost to the one from whom it was stolen is its fair market value. Otherwise, valuable property rights in certain kinds of property vitally needed in industry would be seriously jeopardized by the mere fact that once stolen the only remaining use for such property, and hence the only market therefore, is as 'salvage." (*Id.* at p. 924.) Therefore, "under these circumstances the term 'market value' is synonymous with the term 'replacement value.'" (*Ibid.*) The court then concluded that because the cable defendant stole was made to specification and used only by telephone companies, it was unique. Under these circumstances, the replacement cost of the cable was equal to its market value. (*Id.* at pp. 924-925.)

The owner of the property may testify as to its value. (*People v. Coleman* (1963) 222 Cal.App.2d 358, 361; *People v. Lenahan* (1940) 38 Cal.App.2d 39, 41; *People v. Haney* (1932) 126 Cal.App. 473, 475-476.) Value may be proved by opinion evidence or circumstantial evidence. The testimony of an owner as to the value of the property may be sufficient. (See Evid. Code, § 813; *People v. More* (1935) 10 Cal.App.2d 144, 145.) "The weight to be given the owner's testimony as to value is for the trier of the fact." (*People v. Henderson* (1965) 238 Cal.App.2d 566, 567.)

In the present matter, the stolen metal die is unique, and there is a limited market for this product. Shaw, owner of Craftech, explained that Craftech makes airplane parts from sheet metal by using dies to stamp out the parts. Shaw identified the stolen metal die as one built by Craftech but owned by a customer. He explained that if it is customer-owned, a legal agreement is drafted and signed making Craftech the agent and possessor of the metal die. Shaw testified that he knew his business and the values of his tools. He also stated that his company built the stolen die, and that his company was the agent and possessor of the die. We reject defendant's claim that Shaw was never established as the owner of the die.

Shaw further explained that the stolen metal die weighed approximately 1,500 pounds and was 18 inches by 18 inches. In regards to the approximate value of the metal die, Shaw stated, "That die—I actually looked it up this morning—was somewhere around $4,500." Later, on cross-examination, Shaw stated, "My educated guess is that it's customer-owned. But that particular die was built by us. In other words, I quoted my customer X amount of dollars. In this case it appeared to be about . . . $4,600 to build

that die for them." Shaw also explained that the metal die was made out of kirksite and was about 94 percent zinc. He testified, "The zinc is something that just fluctuates up and down. Today it's—Actually yesterday it was 67.86 cents a pound. In 2007 it was close to $2 a pound." Shaw also responded, "Correct," in response to defense counsel's question, "So with those materials and the labor involved you were able to create that die/mold, and bill Boeing $4,500?" In response to defense counsel's question, "Now, you said that you were able to look at it this morning, though, right, some sort of documentation," Shaw replied, "Maybe I misspoke. I asked my son to look up the value of that, and he told me it was 4,000-something dollars." The above testimony of Shaw was not timely objected to at the time of trial, and most of it was, in fact, elicited by defense counsel. "'"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) Here, defendant did not make a timely and specific objection to Shaw's valuation testimony on hearsay or lack of foundation grounds and, thus, has not preserved his evidentiary issues for appeal.[2]

In any event, even if the trial court erred in allowing inadmissible hearsay evidence or evidence based on lack of foundation, there was sufficient competent evidence in the record for a reasonable juror to conclude the value of the metal die exceeded $400. Shaw testified that he knew his business and the value of most of his

[2] Defense counsel did not object to Shaw's valuation testimony based on hearsay and lack of foundation grounds until on redirect examination.

tools. Shaw explained the metal die was made of kirksite, which is about 94 to 96 percent zinc alloy, and was built within the last 10 years. Shaw elaborated, "As you realize in the business world, the labor dollar increases every year. And so to reproduce something like that is going to cost me more today than yesterday. [¶] The zinc is something that just fluctuates up and down. Today it's—Actually yesterday it was 67.86 cents a pound. In 2007 it was close to $2 a pound." He further explained that the stolen metal die weighed about 1,500 pounds. Moreover, defendant informed Sergeant Brown that he was planning on taking two or three dies, or as many as they could fit on his trailer, expecting to get around $2,000 for the metal. Additionally, the jury was able to view security cameras of the incident, as well as the metal die. The jury knew defendant and his cohorts required a truck, trailer, and bobcat to steal the 1,500 pound metal die. From this evidence, the jury could reasonably determine the fair market value or the replacement value of the stolen metal die exceeded $400.

C. *Conduct Credits*

Defendant next contends that the trial court erred in failing to award him conduct credits at the time of sentencing. Specifically, he claims, pursuant to *People v. Dieck* (2009) 46 Cal.4th 934 (*Dieck*), that he is entitled to two days of conduct credit for the four days he spent in custody prior to his sentencing on May 1, 2009. Citing *Dieck*, at pages 940-941, the People respond, "Assuming for the sake of this argument that [defendant] obeyed all of the rules while he was in jail, and that the only reason he was only in custody was because of the instant matter, he would be entitled to two days of good conduct credit to Penal Code section 4019, subdivision (c), because he was

ultimately sentenced to more than six days in custody." The People also assert that "it is not necessary for this Court to remand this matter to the trial court because [defendant] has an available, and preferred, remedy in the form of bringing this matter to the attention of the trial court by way of a motion requesting the good conduct credit."

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of presentence credit are called, collectively, conduct credit. (*Dieck, supra*, 46 Cal.4th at p. 939, fn. 3.)

Here, at the sentencing hearing, the trial court awarded defendant four days of actual credit. The presentence probation report was completed on February 11, 2009, and defendant was sentenced on May 1, 2009, prior to our Supreme Court's opinion in *Dieck*, *supra*, 46 Cal.4th 934. Prior to the Supreme Court's opinion in *Dieck*, former section 4019 applied "for each six-day period in which a prisoner is confined." (See *Dieck*, at p. 939.) However, the Legislature passed Senate Bill No. 3X 18 (2009-2010 Ex. Sess.) in October 2009, which amended section 4019 effective January 25, 2010. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Accordingly, the probation officer, the parties, and the court were under an impression that defendant was not entitled to conduct credits.

Because the record is unclear whether defendant is entitled to conduct credit based on his performance or behavior while in custody, we will remand the matter to allow the trial court to determine whether defendant is entitled to two days of conduct credit.[3]

III

DISPOSITION

The matter is remanded to the superior court for the limited purpose of determining whether defendant is entitled to two days of conduct credit. If the superior court determines defendant is entitled to two days of conduct credit, the superior court clerk is ordered to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.

[3] At that time, the parties can raise the issue of whether defendant's custody was a result of the instant case solely or was "only *part* of the reason for [defendant] being in custody on those two days."